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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

SURAIYA MATEEN et al
Petitioners,

VS.

FRANK DICUS
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether striking of answers and entering a default judgment in a case where there are no discovery abuses is in violation of fifth, fourteenth and seventh amendments of the Constitution of the United States.

AND

Whether, in a Multi-defendants case, Entry of default judgment against few defendants without determining the liability of all the Co defendants is in violation of the due process, and is in conflict with the opinion of the U.S. Supreme Court in *Frow v. De la Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872) and in conflict with the opinion of almost all the Circuit Courts.

PREFACE

The Federal Rule of Civil Procedure, Rule 37 (b) & (d), is invariably applied by the trial courts to enter default judgments without considering lesser sanctions. Further, in multiparty cases, the default judgment is often entered against few defendants without determining the liability of all the defendants.

Petitioners claim that entry of default judgment as a sanction is abuse of discretion of the trial courts:

1 It prevents the case from getting adjudicated on its merits.

2. It violates the Due Process clause of the Fifth, Fourteenth and the Seventh Amendments of the constitution of the United States.

3. In multi-defendant cases it results in "inconsistent judgments" and thus violate "Frow Doctrine."

This petition is a good vehicle for the US Supreme Court to determine the Constitutionality of Federal Rule of Civil Procedure, Rule 37 (b) & (d), so as to avoid abuse of this Rule by the Courts below.

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PARTIES TO THE PETITION

The parties in the Court of Appeals are the Parties here:

Suraiya Mateen
Roohi Faiyaz
Reem Muhammadi
Petitioners

Frank Dicus
Respondent

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797 F.2d 151	Aug 01, 1986	Third
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819 F.2d 806	May 20, 1987	Seventh

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioners submit the Final Opinion of the Court of Appeals entered on June 27, 2007 for review, *Mateen et al v. Dicus* A05A1372 (Appendix B).

THE OPINIONS BELOW

1. Supreme Court of Georgia's Denial of the Petition for Certiorari to Court of Appeals entered on January 07, 2008, Case No. S07C1814. (Appendix A)

2. The Final Judgment of the Court of Appeals of the State of Georgia entered on June 27, 2007 *Mateen et al v. Dicus , A05A1372* (Appendix B).

3. State Court Orders Denying to set aside the Default judgment (Appendix C).

4. Voluntary Dismissal with Prejudice of a Co defendant (Appendix D).

5. Trial Court Orders limiting time for discovery proceedings. (Appendix E)

6. Notice of scheduling depositions in violation of Court Orders, (Appendix F).

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals of the State of Georgia entered its Final Opinion on June 27, 2007.

The Supreme Court of Georgia denied the Petition for Certiorari on January 07, 2008.

The Petition in the United States Supreme Court is being timely filed within ninety days from January 07, 2008.

Pursuant to 28 U. S. C. §1257(a) , the United States Supreme Court possesses jurisdiction to review State-Court determinations by writ of certiorari, where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, or any title, right, privilege, or immunity is specially set up or claimed under the Constitution .

1. FEDERAL CONSTITUTIONAL PROVISIONS

This case involves the Fifth Amendment , the Fourteenth Amendment and the Seventh Amendment of the US Constitution: .....No person be deprived of life, liberty, or property, without due process of law & the right to jury trial should be preserved.

2. STATE CONSTITUTIONAL PROVISIONS

Article I, Section I, Para I , II & XI ...No person shall be deprived of life, liberty, or property except by due process. Right to Jury Trial shall remain inviolate.

3. FFEDERAL STATUTORY PROVISIONS

FRCP , § § Rules 37 (b) 37(d),

FRCP 41(a)&(b), Rule 54 (b)

4. STATE STATUTES

OCGA § § 9-11- 37 (b) & (d), 9-11- 41(a)& (b)

OCGA § § 9-11-54 (b)

STATEMENT OF THE CASE

A large number of well defined class of civil cases exist across the United States in which the Trial Courts routinely either dismiss the cases or enter default judgments against defendants. This practice is prohibiting the cases to get adjudicated on their merits. Consequently, the innocent defendants against whom some frivolous cases are filed get deprived of their constitutional rights to have their day in the Court. Moreover, State Appellate Courts routinely affirm the Lower Court judgments, without giving due consideration to the constitutional rights of the appellants.

Petitioners are the victims of the above stated unconstitutional practice of the Courts. This Petition is an attempt to draw the attention of the United

States Supreme Court towards the abuse of discretion of the lower courts and the resultant violation of the constitutional laws.

This petition seeks review of the Final Opinion of the Court of Appeals of the State of Georgia entered on June 27, 2007. The Court of Appeals have Affirmed the Trial Court's Denial to Set Aside the Default judgment entered erroneously against petitioners.

The United States Supreme Court's intervention is required here as the Court of Appeals has avowedly created a conflict with the well established opinion of this court in *Frow v. De La Vega* and has also created a conflict with almost every Circuit Court.

Appellants have set forth to the court of appeals a prima facie case of respondents contempt , fraud and misrepresentations in the lower courts.

This is a case wherein Respondents filed a frivolous joint complaint of alleged fraudulent transfers of some real estate properties against petitioners and their attorney, John Walrath.

Respondents then failed to complete the discovery proceedings within the extended discovery period as ordered by the trial court and intentionally in bad faith failed to prosecute the case.

Respondents were in contempt of Court Orders entered on November 10, 1998, Record page No. 1186, as they intentionally failed to comply with the court orders regarding discovery proceedings.

Further, record of the case is evident of the fact that respondents neither filed any request nor sought permission with the trial court to extend the discovery time. They simply ignored the Court Orders.

As a matter of law, Pursuant to FRCP 41 (b) and OCGA Section 9-11-41(b) Respondent's case was involuntarily dismissed by Operation of Law.

Although, the case was involuntarily dismissed, but, Petitioners answered all the untimely interrogatories of respondents appeared for all the untimely scheduled depositions.

After complying to all the untimely requests of the respondents, petitioners filed Motions to Dismiss the case and Motions for Summary judgments. Record Page Nos. 2229 - 2346.

A hearing was scheduled, but during the hearing, respondents took advantage of the pro se litigants and misguided the trial court to enter a default judgment against petitioners.

The Trial Court instead of dismissing the case

for respondents contempt of court orders and failure to prosecute, entered a default judgment against petitioners, although the court had no jurisdiction to do so. Pursuant to FRCP 41(b), the case was no more existing in the trial court. But , still the court entered default judgment against petitioners, as a punishment for their inability to pay $ 2000 to respondents.

The erroneously entered default judgment had deprived the petitioners of their right to a jury trial. It was the burden on respondents to prove an allegation of fraudulent transfers in a jury trial.

Subsequent to the default judgment , respondents voluntarily dismissed with prejudice a joint co defendant attorney, John Walrath.

Dismissal of Walrath adjudicated the case on merits. This has resulted in inconsistency with the

default judgment against petitioners. The default judgment against the petitioners was therefore rendered void as a matter of law.

Petitioners therefore filed a Motion in the trial court to set aside the default judgment. The Motion was denied without a hearing. Petitioners filed a notice of appeal. While the notice was pending, the trial court entered a judgment on damages against petitioners.

An appeal was filed for damages as well for the denial to set aside the default judgment. Court of Appeals affirmed the judgment on damages and declined to rule on the Denial to set aside the default judgment.

Petitioners filed a Petition for certiorari in the Supreme Court of Georgia. Supreme Court , totally

Reversed the Court of Appeals remanded the case back to the Court of Appeals to rule on the remaining issues, *Mateen v.Dicus,281 Ga. 455, 457, 637 SE.2d 377(2006)*.

The Court of Appeals entered its final Opinion on June 27, 2007. The Court of Appeals vacated its orders entered on September 8, 2005, and affirmed only two errors: Respondent's addition of a party to the case through Notice of Publication and Trial Court's Denial to set aside the default judgment.

The Court of Appeals affirmation of the denial of the trial court to set aside the default judgment has raised the constitutional issues of due process clause.

The Court of Appeals Opinion below is also in conflict with the Opinion of this court in Frow and in conflict with the opinions of almost every Circuit Court.

Grant of this petition is therefore warranted.

BRIEF HISTORY AND STATEMENT OF FACTS

The history of the case goes back to a business transaction between respondent Dicus and Dicus Ent. and one of the defendants, Faiyaz and Medina Ent.

None of the other defendants including the petitioners were ever a party to that business deal. The business transaction between Dicus and Faiyaz ended in an arbitration . Faiyaz lost the arbitration. Dicus then repossessed his collateral which he had sold to Faiyaz for $ 380, 000 under Uniform Commercial Code R-Page 3807 (Vol. VII). He then sold it to a third party and failed to file for any deficiency claim., *ref* to O.C.G.A.§ 44 -14 - 161 (a)

Respondent was barred from pursuing any further action on his alleged claims. Therefore, as a matter of law, the arbitration award was deemed

satisfied and Dicus was no more a creditor of Faiyaz.

On March 27, 1998, after the repossession of the collateral, out of greed , respondent filed a frivolous complaint of alleged fraudulent transfers against Faiyaz and his whole family (Petitioners). The properties involved were the assets of a Living Trust declared in the year 1992.

His allegation against petitioner Mateen was of conspiracy and against the co defendant attorney, Mr. John Walrath was of conspiracy along with an allegation of preparing the documents of alleged fraudulent transfers.

Defendants had following meritorious defenses to Dicus's frivolous complaint:

1. Properties were the assets of a living trust: The real estate properties against which an alleged

fraudulent transfer action was filed were the assets of a Living Trust, declared by petitioner Mateen in the year 1992 , six years before Faiyaz even entered into any business transaction with Dicus. Living Trust document , R- Page 2252 - 2332 .

2. Dicus no more a creditor : Dicus was no more a creditor of Faiyaz as his arbitration award was satisfied when he repossessed his collateral and sold it. Farmers Bank Union Point v. Hubbard, 247 Ga 431 276 S.E. 2d 622 (1981) Emmons v . Burkett 256 Ga 908 (1987) Borden v. Pope Jeep - Eagle Inc. 200 Ga App.176, 407 S.E. 3d 128, 133 (1991) Business Dev.Corp v. Constable, 261 Ga. 886, 413 S.E 2d 447, 448 (1992), O.C.G.A.§ 44 -14 - 161 (a)

Based on the above citations and rules of law Dicus's complaint against the appellants was abusive ,

frivolous and was only to harass and to usurp the assets of the trust.

Petitioners filed motions to dismiss the frivolous complaint of respondent and submitted briefs and affidavits in support, R- Page 87 - 175.

Respondents knowing very well the meritorious defenses of petitioners, intentionally failed to complete the discovery proceedings within six months time as required by the Uniform Superior Court Rule 5.

Later, On November 6, 1998 , which was the last day of statutory time limit to complete the discovery, respondents filed a Motion to extend discovery time.

On November 10, 1998 , the Trial Court Granted Plaintiff's motion and Ordered that the discovery should be completed within three months from the ruling on Motions scheduled for hearing on

December 21, 1998. R- Page 1186 . Appendix E.

The extended discovery period ended on March 21, 1999. Respondents again intentionally failed to complete the discovery by March 21, 1999, as ordered by the trial court. Record of the case is evident of the fact that respondents did not file any further requests for the extension of the discovery period after the expiration of the date as ordered by the court.

Pursuant to FRCP 41(b) and OCGA § 9-11-41(b), the case was involuntarily dismissed by operation of law due to respondents' contempt of Court Orders.

On May 25, 1999, while the petitioners were out of the country on vacation, and the case was already dismissed , respondents knowingly and intentionally misguided the trial court by scheduling a Rule Nisi

hearing R- Page 1238 . They fraudulently presented an issue of sanctions which was already presented in the trial court on December 21, 1998 and was adjudicated in favor of petitioners.

Further, the notice of Rule Nisi hearing was intentionally not served upon the petitioners' attorney, Mr. Robert McDonnell, who was representing them at that time. The attorney therefore failed to be present at the hearing. The Court granted sanctions of $ 2000 in absence of petitioners and their attorney. Petitioners' attorney later filed a Motion to set aside the Orders of sanctions and submitted an affidavit in this regard, R- Page No. 1269 - 1272. The Court denied the Motion without a hearing.

After returning from vacation, petitioners came to know about the sanctions, they were not in a

position to pay $ 2000 . They therefore filed a joint motion requesting the Court to allow them some time to pay $ 2000 towards attorney fee as ordered by the court, R Page 2282 - 2283. But, as usual, appellees again misguided the Trial Court to impose this unusual harsh sanction to strike off the answers of appellants for not paying $ 2000 on time.

Pursuant to OCGA Section 9-11-37(d) and FRCP 37(d), the Courts have discretion to strike the answers of parties who fail to appear for depositions and not as a sanction for delay in payment of attorney fee.

As evident from the record of the case, there has been no discovery abuses on part of petitioners.

All the defendants timely answered the interrogatories which were submitted in May, 1999.

Respondents scheduled depositions six months

after the expiration of the discovery period . They intentionally ignored the court orders to complete discovery by march 21, 1999 and scheduled depositions for the first time on September 9, 1999, Appendix F.

Petitioners subjected themselves to all the untimely scheduled depositions . The depositions are docketed on August 16,2000.

The depositions are on record on the following pages:

Deposition of Suraiya Mateen R-Page 1492 - 1653

Deposition of Roohi Faiyaz R- Page 1654 - 1794

Deposition of Reema Faiyaz R- Page 1795 - 1960

Deposition of Mohd Faiyaz R- Page 1961 - 2126

Amazingly, on February 12, 2001 although all the depositions and interrogatories were in front of the Trial Court , still the Trial Court entered a default judgment against petitioners , R .P. Nos 2621 - 2627

Upon misguidance of respondents, the trial court has misapplied OCGA §, 9-11-37(d) which is incorporated as FRCP Rule, 37 (d) and has stricken off the meritorious answers of petitioners and entered a default judgment against them.

The language of the FRCP Rule 37(d) is as follows:

The court where the action is pending may, on motion, order sanctions if :

(i) A party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or

(ii) A party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

Thus, the question arises whether the petitioners failed to appear for their depositions as contemplated in Rule 37(d)? OR Did they fail to submit their interrogatories ?

The record of the case shows that petitioners did appear for their depositions . Docket of the case, Page Nos. 1492 - 2126 is evident of the fact that petitioners did appeared for all their untimely scheduled depositions and submitted answers to all the interrogatories on time. Thus, it an ERROR of the trial court to enter a default judgment against petitioners for the following reasons:

1. Violation of Constitutional laws: Entry of a default judgment without considering the lesser sanctions is the violation of the Fifth, fourteenth and seventh amendments of the Constitution of

the united States. Particularly, when there are no discovery abuses.

2. Conflict with Frow Doctrine : In a Multiparty case, entry of default judgment against few defendants prior to the determination of the liability of all the defendants is unconstitutional and is in conflict with the decision of the US Supreme court in *Frow v. De L Vega* and also in conflict with numerous appellate decisions,

Subsequent to the default judgment, respondents voluntarily dismissed the co defendant , Attorney John Walrath.

John Walrath was vital to the case as a joint co defendant ever since March 27, 1998. Respondents failed to prosecute the case for five years. On March 5, 2003 co defendant John Walrath filed a Motion for

Summary judgment and requested for an oral argument. (R-P.Nos. 3038 - 3061). A hearing was scheduled for September 13, 2003.

On September 8, 2003 respondents voluntarily dismissed with prejudice attorney, John Walrath, R- Page 3594-3595.

As a matter of law, Voluntary dismissal of the case with prejudice against co defendant John Walrath is the final adjudication of the case on merits, R-P.Nos. 3594 - 3595. Consequently, the default judgment against petitioners was rendered void.

Grant v. Franklin, 244 Ga. App. 370, 371 (534 SE2d 584) (2000);

Kent v. State Farm &c. Ins. Co., 233 Ga. App. 564, 566 (2) (504 SE2d 710) (1998).

Crolley v. Dergara, 248 Ga. App. 423 A00A2424.

In view of the co defendant , John Walrath's

dismissal of allegations on merits, Petitioners filed a Motion to set aside the fraudulently obtained default judgment. Respondents failed to file a response. But, still on November 6, 2003,the Court denied petitioners' Motion without a hearing. R- Page 3737- 3738.

On November 17, 2003, petitioners filed a Notice of discretionary appeal for the denial of the trial court to set aside the default judgment.

On November 26,2003 , while the petitioners appeal was pending R- Page 3765 - 3769 , the trial court entered a judgment on damages against petitioners without a jury. Petitioners appealed the judgment n damages along with all the interlocutory judgments in the Court of Appeals.

On September 8, 2005 , the Court of Appeals affirmed the trial Court's Final judgment on damages.

Petitioner filed a Certiorari for Court of Appeals in the Supreme Court of Georgia. The Certiorari was Granted.

On October 30, 2006 , the Supreme Court of Georgia Reversed the Court of Appeals affirmation of the Trial Court's judgment on damages and remanded the case with directions to review the remaining errors of trial court which the Court of appeals declined to review in its opinion entered on September 8, 2005.

On June 27, 2007, the Court of Appeals vacated Sept 8, 2005 orders in total, and affirmed only two of the Trial Court Orders which it declined to review earlier.

Entry of the default judgment and then Denial to set it aside has raised issues of National Importance. Conflict of the FRCP Rule 37 (b) & (d) with the due process laws of the constitution warrant intervention of

the Supreme Court and hence Grant of this petition.

REASONS FOR GRANTING THE PETITION

I. Petitioners have Presented questions of National Importance

This Petition should be granted as the petitioners have presented to the Honorable Supreme Court, "Questions" that are of great National importance. Review of this petition will help to resolve the existing conflicts between the Federal Rules of civil procedures Rule 37 (b)&(d) and the constitutional laws.

It has long been recognized that the fifth , fourteenth and the Seventh amendments of the Constitution of the United States guarantee the Constitutional rights of all the citizens of the United States. *See* Shaughness v. Mezei, 345 U.S. 206,212 (1953); Wong Wing v. united States, 163 U.. 228, 238

(1896) ; Yick Wo v. Hopkin, 118 U.S 356, 369 (1886).

This case is an excellent vehicle for the United States Supreme Court to resolve the issue of violation of the due process clause of the fifth, Fourteenth and the seventh Amendments of the constitution which occurs involuntarily when the Trial Courts exercise their discretion and apply FRCP Rule, 37(b)&(d) to enter default judgments.

After the entry of the default judgment, the only hope left for the adverse party is to "Appeal". A large segment of population as well as the judiciary system is significantly affected by this practice.

The recent decision of the Supreme Court *In Cooper* has technically declared its superiority to state officials in interpreting the Constitution laws. Now, when it comes to the meaning of the Constitution, the

Justices of the Supreme Court are not only the final authority in the temporal sense of having the final say, but also as the only authority in an absolute sense.

The Supreme Court have powers to enforce the provisions of the constitutional Laws . Simultaneously, the Supreme Court have powers to supervise the improper application of the federal rules of civil procedures .

The Supreme Court has to review the Trial Court's denial to set aside a void default judgment and the Court of Appeals affirmation of the Denial.

Therefore, in order to restore the integrity of the constitutional laws, and to put limitations on the discretion of the trial courts, it is mandatory for the Supreme Court to Grant this Petition

II. THE DECISION BELOW CONFLICTS WITH RELEVANT DECISIONS OF NUMEROUS HIGHEST STATE COURTS AND THE UNITED STATES SUPREME COURT

The Court of Appeals has affirmed the Trial Courts Denial of Petitioners Motion to set aside the default judgment. On Page 4 - 5 of its opinion the Court of Appeals has stated:

" Appellants contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor renders void the judgment against the remaining defendants is not supported by Georgia Law....."

As the Opinion of the Court of Appeals here drastically departs from the mainstream of American jurisprudence and from the Federal and State constitutional laws, it warrants review.

1. The Court of Appeals opinion is in conflict with

the well established opinion of the United States Supreme Court in *Frow v. De la Vega,* 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

2. The Court of Appeals is in conflict with nearly all the decisions of every circuit court in this context .

The State of Georgia's Rules of Civil Procedure and the Constitutional laws of Georgia are framed in accordance with the Federal Rules of Civil Procedure and the Federal Constitutional laws.

In the instant case , the Court of Appeals was bounded to reverse the trial court orders denying to set aside the default judgment in view of the FRCP 54 (b) and also in view of the well established opinion of the United States Supreme Court in *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

The above case, well known as "Frow Doctrine" is applied by almost all the Appellate Courts of the United States wherein multiple defendants are jointly involved.

Petitioners have raised the necessity of applying Frow doctrine in their opening brief filed in the Court of Appeals. But, the court of Appeals overlooked, and consequently, the opinion entered below is in conflict with the opinion of the United States Supreme Court and also in conflict with the opinion of almost every Appellate court of the United States.

To maintain the harmony of judicial system , the Supreme Court has to Grant this petition so as to review the following:

1. APPLICATION OF FRCP 37 (b)&(d) VOILATES THE CONSTITUTIONAL LAWS

Numerous highest courts of different states are of opinion that striking of answers and entry of default judgments is a harsh sanction, as it prohibits the case from proceeding on its merits. Consequently, deprives the victimized parties of their constitutional rights of Due Process.

Pursuant to OCGA Section 9-11-37(d) and FRCP 37(d), the Courts can strike the answers and enter default judgment for parties who fail to appear for depositions and not as a punishment for failure to pay Monetary sanction.

No matter , whatever is the reason for striking the answers and entry of default judgments , the aggrieved parties are invariably deprived of their

fundamental right of due process and the constitutional laws are involuntarily violated.

In order to harmonize the Federal Rules of Civil Procedure and the Constitutional rights of the public, the trial court's discretion to enter default judgments should be curtailed.

It is the constitutional responsibility of the trial court judges to maintain the integrity of the constitutional laws and make use of their discretion in a way that does not deprive any person of their life , liberty or property without due process of law.

Almost every Appellate court have disfavored entry of the default judgment. Following is the list of cases which are in Conflict with the opinion below. *Newland v. Superior Court* (1995), 40 Cal.App.4th 608, *Hurtado v. Western Med.Ctr.*(1990), 222 Cal.App.3d

1198, 1204

Midwife v. Bernal (1988), 203 Cal.App.3d 57,6

Jones v. Otero (1984), 156 Cal.App.3d at p.754

Twentieth Century Ins.Co v. Tak Hung Choong (2000), 79 Cal.App.4th 1274 [Monetary sanctions pursuant to C.C.P. §177.5 imposed but not paid; trial court imposed additional monetary sanctions and propriety of 2d award was sole issue on appeal;]

"As a general rule, the trial court should attempt to compel compliance with its orders through the imposition of lesser sanctions than dismissal." (Citation omitted.) *Joel v. Duet Holdings*, 181 Ga. App. at 707. *Joel v. Duet Holdings*, 181 Ga. App. 705, 707 (353 SE2d 548) (1987). caused by the failure to respond. OCGA § 9-11-37 (b) (2).

The drastic sanctions of dismissal and default

may be imposed only "in the most flagrant cases — where the failure is willful, in bad faith or in conscious disregard of an order."

In the alternative, the Court could have increased the amount of the sanctions imposed or add some interest to the original amount, but should not have deprived the Petitioners from their inherent right of presenting their meritorious case to the Court and should not have deprived the Petitioners and her family of their properties without a due process.

Whether state action against an individual was a deprivation of life, liberty or property is initially resolved by determining the rights of the individual. Process was due if rights were involved.

'[D]efault judgment is a drastic sanction that should bc invoked only in extreme situations.

Whenever possible, cases should be decided on their merits, for default judgment is not favored in the law.' " Ryles v. First Oglethorpe Co., 213 Ga. App. 327, 328 (1) (444 SE2d 578) (1994)".

It is true that the trial court has a discretion in whether the sanctions of dismissal or default should be entered under Code Ann. 81A-137 (d). Hohlstein v. White, 117 Ga. App. 207 (1) (160 SE2d 232); Williamson v. Lunsford, 119 Ga. App. 240 (1) (166 SE2d 622). However, the lesser harsh sanctions should be considered first. In considering another subsection of the Rule, the Georgia Supreme Court has recognized the desirability of choosing the less harsh measure when circumstances warrant stating that "Justice is the object of all judicial investigations." Milholland v. Oglesby, 223 Ga. 230 (154 SE2d 194). Mullinax, 122

Ga. App. 833 (178 SE2d 909) [(1970)]. The Supreme Court has cautioned against the harsh application of this rule. Millholland v. Oglesby, 223 Ga. 230 (154 SE2d 194) [(1967)].

In , Sumitomo Copper Litigation, 204 F.R.D. 58, 60 (S.D.N.Y. 2001) ("A number of factors may be considered when deciding whether discovery abuse warrants the entry of a default judgment against the transgressor. Among those factors are: '(a) willfulness or bad faith of the noncompliant party; (b) the history, if any, of noncompliance; (c) the effectiveness of lesser sanctions; (d) whether the noncompliant party had been warned about the possibility of sanctions; (e) the complicity; and (f) prejudice to the moving party.' . . . *Sadler v. Dimensions Health Corp.*, 178 F.R.D. 56, 59 (D. Md. 1998) (discussing dismissal or default as

sanction for violations of 37(b) and (d), and stating "a court seeking to impose dismissal as a discovery sanction under Rule 37 must inquire into: (1) whether the noncomplying party acted in bad faith; (2) the amount of prejudice the noncompliance has caused the adversary, which necessarily includes an inquiry into the materiality of the evidence the party failed to produce; (3) the need for deterring the particular type of noncompliance; and (4) the effectiveness of less drastic sanctions." (citations omitted)). *Cf. In re Rossmiller*, 140 B.R. 1000, 1003-04 (D. Col. 1992) (discussing Rule 37(d) in context of failure to respond to interrogatories or requests for production and commenting that "[a] default judgment is a harsh sanction that will be imposed only when the failure to comply with discovery demands is the result of

"'wilfulness, bad faith, or [some] fault of petitioner' rather than inability to comply," and further stating that "[i]n making findings on the issue of fault, a court should consider . . . (1) the degree of actual prejudice to [the] other party; (2) the amount of interference with the judicial process; and (3) the culpability of the litigant. Finally, the cases teach that a court should not enter a default judgment without first considering if lesser sanctions would be effective." (internal citations omitted)); *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assoc.*, 872 F.2d 88, 92 (4th Cir. 1989)

In the instant case, the properties involved were the assets of a living trust . Petitioners are the beneficiaries. The properties worth more than a million dollars. At the time when they came to know about $ 2000 sanctions Petitioners were undergoing severe

financial crises. They therefore requested the Trial court to allow some time for payment of $ 2000 to respondents. The Trial Court instead of considering their motion , exercised its discretion to strike the answers and enter a default judgment against petitioners.

Petitioners were thus deprived of their fundamental civil rights of a jury trial and lost their properties worth more than a million dollars for the sake of $ 2000.

In order to protect the constitutional rights of Jury trial of the petitioners, it was mandatory for the Trial Court to consider lesser sanctions than striking the answers and entry of a default judgment.

Petitioners pray for the equal protection of laws and restoration of the constitution.

2. OPINION BELOW IN CONFLICT WITH THE ESTABLISHED OPINION OF THE US SUPREME COURT

"FROW DOCTRINE"

The principal issue in the instant Petition is, whether the court of Appeals Erred in not applying the well established "Frow doctrine", which is inculcated in the opinion of the U.S. Supreme Court in *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

In cases where Multiple Defendants are involved with joint liability , this doctrine is strongly applied by numerous courts. If multiple defendants are jointly involved, and a default judgment is entered against few, without determining the liability of all the defendants, *Frow* becomes the leading case on the subject of the invalidity of default judgment in such actions.

In Frow v. De La Vega, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872), the United States Supreme Court has declared: "In a default judgment situation when a plaintiff has alleged joint liability, a default judgment should not be entered against the defaulting defendant if one or more of the defendants do not default." *Id.* at 650, 473 S.E.2d at 661. Under this principle, the entry of default serves to cut off the defaulting defendant's right to participate in the trial on the merits of the other defendants. In effect, the defaulting defendant is locked out, and a final judgment against him must await the outcome or judgment of the remaining defendants. *Id.*

Moore v. Sullivan, 123 N.C. App. 647, 473 S.E.2d 659 (1996)".

In Frow, De La Vega filed suit against Frow and 13

other defendants, alleging that 8 of the defendants, including Frow, fraudulently obtained a tract of land by various devices, including the use of a forged power of attorney. All defendants except Frow filed timely answers. On application of De La Vega, the district court entered the equivalent of a default judgment against Frow in which it determined that De La Vega had title to the land and awarded injunctive relief. The case was then tried and resolved in favor of the answering defendants, resulting in its dismissal. In his appeal, Frow contended that the court erred in entering judgment against him while the case was still pending on the merits as to the answering defendants.

The United States Supreme Court reversed the judgment against Frow, holding:

"If the court in such a case as this can lawfully make a

final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other

defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing.

But, if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. 82 U.S. at 554.

Frow establishes a general rule that "when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that

defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted." 10A Charles A. Wright et al., Federal Practice and Procedure: Civil § 2690 at 73 (3d ed. 1998).

Wright further states that the Frow doctrine also applies where liability is joint and several and even "probably can be extended to situations in which several defendants have closely related defenses." Id. at 76. Several courts have applied Frow in accordance with this approach. See, Farzetta v. Turner & Newall, Ltd., (holding that Frow stands for proposition that if facts are proved at trial which exonerate few defendants and that as matter of logic preclude liability of defaulting defendant, plaintiff cannot obtain judgment against defaulting defendant, even though

defaulter failed to participate in proceeding in which exculpatory facts were proved); Gulf Coast Fans v. Midwest Elec. Importers, 740 F.2d 1499 (11th Cir. 1984) (noting that when defendants are similarly situated, though not jointly liable, judgment should not be entered against defaulting defendant if other defendant prevails on merits);

Federal Deposit Ins. Corp. v. Manatt, 723 F. Supp. 99 (E.D. Ark. 1989) (stating that when defendants are sued jointly and severally and one defaults, judgment should not be entered against defaulter until matter has been adjudicated as to all defendants); Warrington U.S.A., Inc. v. Allen, 631 F. Supp. 1456 (E.D. Wis. 1986)

Days Inns Acquisition Corp. v. Hutchinson, 707 So. 2d 747 (Fla. Dist. App. 1997) (recognizing that

where relief against one defendant is completely dependent upon liability of co-defendant, it is improper to enter default judgment until liability of co-defendant is decided). This approach is summarized in In re Uranium Antitrust Litigation, 617 F.2d at 1257-58:

Frow involved a claim of a joint tort to defraud the plaintiff of title to a res. To the extent that it holds that there cannot be inconsistent adjudications as to joint liability or as to a single res in controversy this ancient equity case remains good law. The result in Frow was clearly mandated by the Court's desire to avoid logically inconsistent adjudications as to liability.

In multiple defendant situations, the long settled rule is that default judgment must be consistent with judgments on merits against other parties. 10 Moor's Federal Practice Section 55.25; 10A Wright & Miller

Section 2690.

Thus , it is an abuse of discretion to enter default judgments that are inconsistent with decisions as to other defendants. Nielson v. Chang (In re First T.D. & Inv., Inc.),253 F.3d 520, 532 (9th Cir. 2001). Such inconsistencies are regarded as "unseemly and absurd." 10A Moor's Federal Practice tion 55.25, quoting Frow v. De La Vega , 82 U.S. 552, 554 (1872); accord 10A Federal Practice and Procedure Section 2690 (quoting Frow).

The Ninth Circuit in its recent invocation of the Frow principle in a Bankruptcy appeal has stated " it is incongruous and unfair for a court to enter a default judgment inconsistent with the merits decision regarding another defendant. First T. D & Inv., Inc., 253 F. 3d at 532 - 33 holds that pursuant to Fed. R.

civ. P. 54 (b) a court violate the Frow principle and abuse its discretion by entering a default judgment. There is also a due process issue embedded in the facts, Jones v. Flowers, 126 S.C t. 1708 (2006).

THE SUPREME COURT OF NEBRASKA

In State Department of Insurance v.Countrywide Truck Insurance Agency, Inc.,258 Neb. 113 (Neb). Following decision entered on Nov. 12, 1999

Default Judgments. A trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default.

Nebraska Court reported two cases in which a default judgment was entered against one of several defendants:

1 In Grant v. Clarke, 58 Neb. 72, 78 N.W. 364 (1899), the plaintiff brought an action against multiple defendants to foreclose a mortgage securing two promissory notes. The court entered a default judgment against one of the defendants and, after trial, resolved the action against the other defendants. On appeal, this court found that there was no proof establishing the plaintiff's title to the notes and his right to foreclose the mortgage securing them, and thus reversed the order of the district court. However, without mentioning Frow v. De La Vega, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

2. A similar relationship between defendants was alleged in Nichiro Gyogyo Kaisha v. Norman, 606 P.2d 401, 404 (Alaska 1980), where the plaintiff alleged that two corporations "acted as a single corporate entity in

regard to the significant facts set forth in the amended complaint and are in essence the alter egos of each other." One of the corporations answered, but the other defaulted, and the plaintiff obtained a default judgment. Characterizing the claim as one alleging joint liability and citing the Frow doctrine, the court held that the default judgment was improperly entered because the defendant had not had an opportunity to defend on the merits.

Similar allegations were considered in In re Vantage Petroleum Corp., 43 B.R. 257 (Bankr. E.D.N.Y. 1984), where bankruptcy trustees alleged that debtors and other defendants fraudulently transferred assets to a corporate entity alleged to be the transferors. In determining that the Frow doctrine precluded entry of a default judgment against the

transferee corporation where other defendants were not in default, the court reasoned that where several defendants are charged with transferring funds to one of the defendants, all of the defendants might be found liable, or fewer than all of the defendants might be found liable; but never would only a transferor or only a transferee or only any third co defendant with same allegations be found liable.

Such a situation, however, becomes a possibility upon the entry of a default judgment solely against [the transferee]. Although all of the alleged transferors might be exonerated, the transferee would nevertheless be held liable. A finding of liability as to the transferee but no liability as to all transferors would certainly be inconsistent and unjust. Id. at 260.

As we interpret Frow v. De La Vega, 82 U.S. (15 Wall.)

552, 21 L. Ed. 60 (1872), a trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default. Under the fraudulent transfer theories asserted by Florida, a trial on the merits could only result in the liability of both Truck and Agency or the liability of neither. However, the entry of default judgment against Truck could lead to the illogical and inconsistent result that Truck, the alleged fraudulent transferor, would be liable, whereas Agency, the alleged fraudulent transferee, would not. Furthermore, in asserting its alternative theories of recovery, Florida alleges joint and collective action on the part of the defendants, as opposed to independent acts on the part of each named defendant. It alleges

that "defendants have converted plaintiff's trust funds to their own benefit," that "defendants have failed and refused to turn over" premiums collected, and that the "transfer of the Truck business and assets and/or USAC premium to other entities constitutes unlawful distributions for the benefit of defendants in violation of their fiduciary obligations to USAC and plaintiff." In light of these allegations of fraudulent transfer, and collective action, we construe the operative petition, taken as a whole, as alleging that the three named defendants are jointly liable as a single entity.

Because the default judgment against Truck and a judgment on the merits in favor of Agency and Fulkerson would be logically inconsistent and prejudicial to the interests of Agency and Fulkerson, we conclude that the Frow doctrine is applicable in this

case involving, inter alia, allegations of joint liability, and that Agency and Fulkerson have sufficient stakes in the outcome of the controversy to afford them standing to appeal from the default judgment against Truck. See, Hussey, Gay & Bell v. Georgia Ports Authority, 204 Ga. App. 504, 420 S.E.2d 50 (1992); C. W. Matthews Contracting Company, Inc. v. Studard, 201 Ga. App. 741, 412 S.E.2d 539 (1991).

For these reasons, we conclude that the district court abused its discretion in denying the motion to stay entry of a default judgment against Truck pending resolution of the claims against Agency and Fulkerson and in entering the default judgment against Truck. The district court should have deferred any entry of judgment until after the claims against Agency and Fulkerson were adjudicated.

For the reasons stated, we conclude that the district court abused its discretion in entering a default judgment. The judgment is therefore reversed and vacated, and the cause is remanded for further proceedings consistent with this opinion.

Amazingly, the decision of the Court of Appeals of Georgia in the instant case is also in conflict with its own decision in Oculus Corporatio v. Fred Chenoweth Equipment Company, 172 Ga App. 547, 323 SE2d 836 (1984) . The Court has stated:

"The trial court erred, however, in entering a final judgment against Oculus based on the default. In Stasco Mechanical Contractors v. Williamson, 157 Ga. App. 545, 546 (278 SE2d 127) (1981), this court held: " 'If . . . the alleged liability is joint a default judgment should not be entered against a defaulting defendant

until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the non-defaulting defendant(s). If joint liability is decided against the defending party and in favor of the plaintiff, plaintiff is then entitled to a judgment against all of the defendants -- both the defaulting and non-defaulting defendants. If joint liability is decided against the plaintiff on the merits or that he has no present right of recovery, as distinguished from an adjudication for the non-defaulting defendant on a defense personal to him, the complaint should be dismissed as to all of the defendants -- both the defaulting and the non-defaulting defendants.' 6 Moore's Federal Practice 55.06, at 55-81 (2d ed. 1976); 10 Wright & Miller,

Federal Practice and Procedure: Civil 2690 (1973); Wall v. Benningfield, 237 Ga. 173 (227 SE2d 13) (1976)."

Generally speaking, the alleged liability of the defendants in a particular case is joint unless there is some rational basis for apportioning the alleged damages among them. See Gilson v. Mitchell, 131 Ga. App. 321 (205 SE2d 421) (1974), aff'd Mitchell v. Gilson, 233 Ga. 453 (211 SE2d 744) (1975); Ga. Farm Bldgs., Inc. v. Willard, 170 Ga. App. 327, 331 (317 SE2d 229) (1984). In the present case, there clearly is no basis for such an apportionment. Rather, the liability of the non-defaulting defendants on their bond is totally dependent on, among other things, the validity of Chenoweth's underlying claim against Oculus, which Chenoweth will be required to prove in

order to recover on the bond. See generally Jackson's Mill & Lumber Co. v. Holliday, 108 Ga. App. 663 (4) (134 SE2d 563) (1963).

A judgment in favor of the non-defaulting defendants based on a failure to prove the validity of the underlying claim against Oculus would require the entry of judgment in favor of all the defendants, including Oculus, that portion of the court's order directing entry of final judgment against Oculus is hereby reversed.

Farzetta v. Turner & Newall, Ltd. (C.A.3, 1986), 797 F.2d 151, 154 (stating that *Frow* stands for the proposition that if facts are proved that exonerate certain defendants, then as a matter of the liability of co defendants against whom a default judgment was obtained is also exonerated, and the plaintiff is

precluded from proceeding any further in the case. In *Internatl. Controls Corp. v. Vesco* (C.A.2, 1976), 535 F.2d 742, 746, fn. 4, the court questioned the continued validity of *Frow* in light of the passage of the Federal Rules of Civil Procedure, but ultimately concluded that "[i]n any event, at most, *Frow* controls in situations where the liability of one defendant necessarily depends upon the liability of the others .

The Maryland Court of Appeals, that state's highest court, reached the same conclusion in the context of *respondeat superior* in a medical malpractice case.

Curry v. Hillcrest Clinic, Inc. (1995), 337 Md. 412, 653 A.2d 934. On appeal, the appellate court held that the plaintiff was not entitled to a default judgment against the hospital.

The procedure established for multiple defendants by Rule 54(b) is strikingly similar and applicable to Frow's doctrine. It not only applies to situations of joint liability, but to those where the liability is *joint and/or several.* Id. at 944 (emphasis added).

Thus, the Fourth Circuit has concluded that *Frow* applies not only to defendants who are alleged to be jointly liable, but also to those defendants thought to be jointly and/or severally liable, or who are otherwise closely interrelated.

In the instant case, it is a Gross Error of the Court of Appeals to overlook the Frow doctrine and make its ruling which is in direct conflict with the ruling of the Supreme Court.

The Grant of Petition is thus warranted.

REFERENCES FOR FROW DOCTRINE

1. 10 Moore's Federal Practice (3 Ed.1997), Section 55.25;

2. 10 Wright, Miller & Kane, Federal Practice and Procedure (2 Ed.1983), Section 2690;

3. 21 Federal Procedure, Lawyers Edition (1997), Section 51:64,

4. *Black's Law Dictionary* 837 (6th ed. 1990)

FROW DOCTRINE APPLICTION BY THE FOLLOWING FEDERAL CIRCUITS :

CITATION	DATE	CIRCUIT
535 F.2d 742	May 13, 1976	Second
463 F.2d 929	Mar 28, 1972	Second
320 F.2d 90	Jul 18, 1963	Second
320 F.2d 90	Jul 18, 1963	Second
349 F.2d 175	Jul 30, 1965	Second

CITATION	DATE	CIRCUIT
349 F.2d 175	Jul 30, 1965	Second
797 F.2d 151	Aug 01, 1986	Third
4 F.3d 1209	Sep 17, 1993	Third
374 F.2d 942	Mar 06, 1967	Fourth
617 F.2d 1248	Feb 15, 1980	Seventh
827 F.2d 252	Aug 26, 1987	Seventh
819 F.2d 806	May 20, 1987	Seventh
154 F.3d 739	Sep 04, 1998	Seventh
116 F.3d 319	Jun 17, 1997	Eighth
370 F.3d 715	Feb 09, 2004	Eighth
105 F.3d 566	Jan 22, 1997	Tenth
82 F.3d 1503	Apr 29, 1996	Tenth
740 F.2d 1499	Sep 10, 1984	Eleventh
234 F.3d 1232	Dec 07, 2000	Eleventh

FROW DOCTRINE IS STRONGLY APPLICABLE IN THIS CASE FOR THE FOLLOWING REASONS

Frow Doctrine and its applicability was raised by Petitioners in their opening brief filed in the Court of Appeals, *Ref*, Page Nos. 14 - 15. This doctrine is highly applicable in this case for the following reasons:

1. Respondent filed an alleged fraudulent transfer action against Petitioners whole family and their attorney, John Walrath jointly.
2. Allegation against all the defendants was of conspiracy and fraudulent transfers.
3. Allegation against attorney John Walrath was of conspiracy as well as an allegation of preparing the documents transferring the properties that were the subject of the alleged fraudulent transfer action.

4.. All the defendants in this case are similarly situated. with same allegation of fraudulent transfers and thus they have joint liability and are undivided.

5. The relief of all the defendants was completely dependant upon the liability of each other and particularly upon the determination of the liability of the joint co defendant John Walrath, as he was charged with the preparation of the documents.

John Walrath is an experienced professional lawyer who represented defendant Faiyaz in his business litigation with Dicus . Now, when the allegation against John Walrath has been adjudicated on merits , then the default judgment against petitioners cannot stand. The allegations are"undivided" and must therefore be prosecuted in a joint action against them

all. *REF:" Black's Law Dictionary* 837 (6th ed. 1990). Since the liability cannot be divided, the matter should be decided only in like manner as to all defendants. Therefore, if one is liable all are liable. If one defendant prevails on merits, then the default judgment cannot be sustained against other defendants.

Thus, in the instant case, Frow is strongly applicable. It an Error of the Court of Appeals to conclude that the dismissal of the co defendant John Walrath did not render the default judgment against other co defendants void.

Frow stands for the rule that a default judgment should not be entered when the theory of recovery is one of joint Liability. Therefore, when defendant John Walrath is not liable, no other defendant is liable and the default judgment against petitioners is rendered void as a matter of law

THE QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED IN THE COURTS BELOW

The Constitutional and the Statutory issues and the application of Frow Doctrine raised in this Court for review have been raised in the courts below.

REF:

Court of Appeals of Georgia

Opening Brief of Appellants: P. Nos. 13, 14, 15, 18 ,19.

Supreme Court of Georgia

Petition for Certiorari : Page Nos. 6, 9 & 27

CONCLUSION

In view of all the above stated Citations of Authority, striking of answers and entry of default judgment is a harsh sanction which violates the constitutional laws of "Due Process".

The Opinion entered below is in conflict with the well established opinion of the United States Supreme Court in *Frow* and also in conflict with the opinions of almost all the Circuit Courts.

WHEREFORE, Petitioners respectfully request the Honorable Court to Grant this Petition and vacate the opinion of the Court of Appeals of Georgia.

Dated:- 05/17/08

Respectfully submitted,

Suraiya Mateen, Pro se

Roohi Faiyaz Pro se

Reem Muhammedi Pro se